UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

MARK R. WILKES,

Petitioner,

vs.

THOMAS L. CAREY, Warden,

Respondent.

Case No: C 04-3030 SBA

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

This matter is now before the Court for consideration of Petitioner's Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254. Through counsel, Petitioner seeks to challenge his 2001 state court conviction and sentence for attempted murder, assault with a deadly weapon and corporal injury to his spouse. Respondent has filed an Answer to the Petition and Petitioner has filed a Traverse. For the reasons discussed below, the Petition is DENIED as to all claims.

I. BACKGROUND

A. PROCEDURAL SUMMARY

1. State Court Proceedings

On November 1, 2001, the Mendocino County District Attorney filed an amended information charging Petitioner with: (1) the attempted murder of his wife Laurel Wilkes ("Laurel") and their friend William Egan Brunson ("Brunson") in violation of Penal Code[1] §§ 664/187 (counts one and three); (2) assault with a deadly weapon in violation of Penal Code § 245(a) (counts two and five); and (3) corporal injury to a spouse in violation of Penal Code § 273.5(a) (count four). As to counts one and two, the information alleged that

[1] All Penal Code references are to the California Penal Code.

Petitioner inflicted great bodily injury, Cal. Penal Code § 12022.7(a); as to counts one, three and four, the information alleged that Petitioner used a deadly weapon (hammer), id. § 12022(b)(1); and as to counts three, four and five, that Petitioner inflicted great bodily injury under circumstances involving domestic violence, id. § 12022.7(e). CT 64-69.

On November 19, 2001, a jury found Petitioner guilty on counts one, two, four and five, and found true the special allegations. The jury returned a not guilty verdict on count three (attempted murder of Laurel). CT 216-229. On January 11, 2002, the trial court sentenced Petitioner to a term of sixteen years in prison. CT 322-323.

Petitioner appealed his conviction to the California Court of Appeal, which, in an unpublished disposition, affirmed his conviction and sentence on February 27, 2003. Respt. Ex. H. The court summarily denied Petitioner's petition for rehearing on March 21, 2003. Id. Exs. I, J. The California Supreme Court issued a summary denial of his petition for review on May 14, 2003. Id. Ex. K, L.

Petitioner sought habeas relief in the state Court of Appeal, which denied relief on February 27, 2003. Id. Exs. M, N, O. The California Supreme Court denied relief on June 18, 2003. Id. Ex. Q, R.

2. Federal Court Proceedings

On July 27, 2004, Petitioner filed the instant Petition for Writ of Habeas Corpus. Dkt. 1. Upon filing, the case was assigned to the Honorable Martin Jenkins, who issued an Order to Show Cause on March 5, 2005. Dkt. 3. Briefing on the Petition was complete upon Petitioner's filing of his Traverse on October 19, 2005. Dkt. 16. Judge Jenkins did not rule on the merits of the Petition.

On April 8, 2008, the action was reassigned to the Honorable Jeremy Fogel following Judge Jenkins' departure from this Court. Dkt. 17. Judge Fogel departed from this Court in 2011 without ruling on the Petition. As a result, the case was reassigned to this Court on September 28, 2011. Dkt. 19. The Court finds the Petition ripe for adjudication.

B. FACTUAL SUMMARY

1. The Underlying Incident

The parties are familiar with the facts of this case, which are summarized herein from the Court of Appeal's unpublished disposition, only to the extent that relate to the issues raised in the Petition. Respt. Ex. H.

Petitioner and Laurel married in or about 1984 and together had three children. Petitioner and Laurel led a "Swingers' Lifestyle," which involved sexual encounters with persons outside their marriage. Brunson, a friend of Petitioner's through work, eventually participated in such encounters with Petitioner and Laurel. Brunson used condoms when having sex with Laurel; Petitioner previously had a vasectomy and did not use them.

On July 3, 2001, Brunson arrived at the Petitioner and Laurel's home in Ukiah to spend the Fourth of July weekend with them. That evening, Brunson slept on the couch in the living room. At around 11:00 p.m., he overheard Petitioner and Laurel arguing in their bedroom. Petitioner left the house, returned, but then left again around midnight.

The next day, July 4, 2001, Petitioner returned home at around 5:00 p.m. as Brunson, Laurel and the children were loading the car for a holiday barbeque and fireworks display. Petitioner, who was upset, spoke with Brunson, but not Laurel or the children. Petitioner left in his truck, still upset. Laurel nonetheless decided that they should go to the picnic without Petitioner. Laurel, Brunson and the children returned home at around 10:00 p.m. Once inside, Brunson found a knife and a marker embedded in the bedroom wall. The knife held two condom wrappers. Nearby, a message had been written on the wall calling Laurel a "whore." On the answering machine was a message from Petitioner.

Laurel and Brunson later summoned the police, who arrived at around 1:00 a.m. on July 5. The responding officer observed the written statement on the wall and the knife with the condom wrappers. The officer also listened to the answering machine message in which the caller threatened to drive a vehicle through the house, threatened to burn the house down rather than allow Laurel to live there without him and accused her of using sex as a weapon. Laurel and Brunson informed the officer that they believed that Petitioner

was responsible for the message and the vandalism. Although the officer advised Brunson and Laurel to stay elsewhere for the evening, they declined to do so because they had nowhere else to stay. However, Laurel said she would seek a protective order the next day in accordance with the officer's recommendation. The officer left the house with the knife, and Laurel and Brunson secured the house.

Laurel and Brunson eventually fell asleep but awoke up hearing the sound of breaking glass. Petitioner entered the room where Laurel and Brunson were staying and ran towards them with his arms raised as if he were about to attack. Brunson grabbed Petitioner's arm in an attempt to restrain him and realized that he was armed. Petitioner then hit Brunson on the head with a rock hammer, causing him to bleed profusely and fall to his knees. Petitioner hit Brunson two more times while he was on the ground. Meanwhile, Laurel was screaming and trying to reach for a telephone. Petitioner used his hammer to attack Laurel, prompting Brunson to get up and come to Laurel's defense. Petitioner then tried to attack Brunson, who was able to disarm him. Brunson suffered further blows to the head and chest. However, Brunson was able to restrain Petitioner by lying on top of him.

Five officers arrived at Petitioner and Laurel's home in response to a distress call received at around 3:00 a.m. The officers heard scuffling and yelling from inside the house and demanded entry. Brunson yelled back that he could not open the door because he was restraining Petitioner. The officers went to the back of the house and gained entry through the glass sliding door which had been shattered. Once Brunson saw the police arrive, he told Petitioner, "It's over."

The police officers observed that Brunson had blood all over his face, head and neck. Brunson informed the officers that Petitioner had attacked him with a hammer. Laurel was crying and distraught with the children, who also were upset, in a bedroom. Laurel was bleeding from her head from a laceration near a bump on her head. Laurel reported that Petitioner had hit her with an object. The officers arrested Petitioner, and found a hammer wet with blood about five feet from him. Inside Petitioner's truck, which

was parked about one-quarter to one-third of a mile from the residence, the officers found a vodka bottle. Brunson suffered a skull fracture and neurological damage. Laurel suffered a laceration to her scalp, a skull fracture and bruising and swelling. All three were taken to the hospital and treated.

2. Investigation and Pretrial Matters

On July 6, 2001, Robert Simerson ("Simerson"), an investigator for the prosecution, interviewed Petitioner at the county jail.[2] He admitted to Simerson that he had been drinking and that he had stuck the knife in the wall and that he wrote the message on the wall of his home. After doing so, he climbed onto the roof of his house and waited for Brunson and Laurel to arrive home from the picnic so that he could see their reaction. After the police came and left, he got off the roof and tried to gain entry to the house. Finding that the doors had been locked and barricaded, Petitioner used a hammer from his toolbox and broke the glass on the sliding glass door to gain entry to the house. Petitioner claims that he was angry at Laurel for calling the police, and that he intended to tell her how much she had hurt him. Petitioner entered the living room, where he saw Laurel and Brunson on the couch. While admitting to their three-way sexual relationship, Brunson denied being angry or jealous. When Brunson and Laurel awoke, Brunson came at him and reached for the hammer. Petitioner admitted hitting Brunson with the hammer, but could not recall whether he struck Laurel.[3]

A jury trial commenced on November 13, 2001. Petitioner was represented by deputy public defender Garry Preneta. Petitioner and Brunson, among others, testified at trial, though Laurel did not. On November 19, 2001, the jury found Petitioner guilty of the attempted murder of Brunson and found true the allegations that he used a deadly weapon and inflicted great bodily injury during the commission of this offense. Petitioner also was found guilty of assault with a deadly weapon and the allegation that he inflicted great

[2] Petitioner was Mirandized and the interview was videotaped.

[3] On July 10, 2001, Brunson gave a statement to Detective Kevin Devries during which he denied being in a consensual sexual relationship with Laurel and Brunson.

bodily injury during the commission of the offense was found true. As to the charges involving Laurel, the jury found Petitioner guilty of corporal injury to a spouse and found true allegations that he used a deadly weapon during the commission of the offense; and guilty of assault with a deadly weapon and infliction of great bodily injury during the commission of the offense. However, the jury acquitted Petitioner of the attempted murder of Laurel. On January 11, 2002, the trial court sentenced Petitioner to a total of sixteen years in prison.

II. STANDARD OF REVIEW

The instant Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. Under AEDPA, a federal court cannot grant habeas relief with respect to any claim adjudicated on the merits in a state-court proceeding unless the proceeding "resulted in a decision that was *contrary to*, or involved an *unreasonable application of*, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (emphasis added).

A state court decision is "contrary to" clearly established federal law "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent." Lockyer v. Andrade, 538 U.S. 63, 73 (2003) (internal quotation marks omitted).

Relief under the "unreasonable application" clause is appropriate "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. Habeas petitioners bear the burden of showing that a state court's decision applied some Supreme Court precedent in an objectively unreasonable manner. Woodford v. Visciotti, 537 U.S. 19, 25 (2002) (per curiam).

In determining whether a state court's decision is contrary to, or involves an unreasonable application of, clearly established federal law, courts in this Circuit look to

the decision of the highest state court to address the merits of the petitioner's claim in a reasoned decision. See Ylst v.Nunnemaker, 501 U.S. 797, 803-804 (1991); LaJoie v. Thompson, 217 F.3d 663, 669 n.7 (9th Cir. 2000). Moreover, "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

III. LEGAL CLAIMS

A. CLAIM ONE: ADMISSION OF VIDEOTAPE TO IMPEACH BRUNSON

Petitioner alleges that the trial court violated his constitutional right to confrontation and due process by denying his request to introduce a videotaped interview of Brunson by Detective Devries. Petitioner contends that he should have been allowed to play a portion of the interview to impeach Brunson's trial testimony, his credibility and his demeanor. Petition at 12-13. In particular, Petitioner claims that while Brunson was tearful at trial, he was calm during the videotaped interview. Petitioner also contends that Brunson lied during the interview about his relationship with Laurel and that he offered conflicting accounts regarding whether the room where the attack took place was illuminated. Id.[4]

The Confrontation Clause of the Sixth Amendment provides that in criminal cases the accused has the right to "be confronted with the witnesses against him." U.S. Const. amend. VI. "Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985). The denial of a criminal defendant's opportunity to impeach a witness in violation of the Confrontation Clause does not justify habeas relief unless the error had "substantial and injurious effect or influence in determining the jury's verdict." O'Neal v. McAninch, 513 U.S. 432, 436 (1995); see also Mammal v. Van de Camp, 926 F.2d 918, 919 (9th Cir. 1991)

[4] In fact, the trial court repeatedly stated that it would allow defense counsel to play the videotape during Petitioner's case in chief, though counsel did not do so. RT 281, 291. The court also allowed defense counsel to use a portion of the tape to refresh Brunson's recollection, RT 336, and re-cross-examination, RT 371-72.

(noting that evidentiary errors do not justify habeas relief unless they "so fatally infected the proceedings as to render them fundamentally unfair.").

Here, Petitioner contends that the videotape would have allowed him to "impeach" Brunson's demeanor on the witness stand. However, Petitioner was readily able to establish the difference between his in-court demeanor and his demeanor during the interview *without* playing the videotape. At the start of his cross-examination of Brunson, defense counsel established that Brunson was not crying when he was interviewed by Detective Devries and was not "unreasonably upset" at that time because he was on medication. RT 260-63, 333. When the prosecution objected to defense questions on relevance grounds, defense counsel countered that such questions went to "his attitude and demeanor on the stand now[.]" RT 263. The trial court overruled the prosecution's objection and allowed Brunson to respond to defense counsel's questions. Id. As such, it is clear from the record that, despite his claims to the contrary, Petitioner had a fair opportunity to impeach Brunson's in-court demeanor without the videotape.

Likewise, defense counsel thoroughly cross-examined Brunson on inconsistencies in his statements regarding his relationship with Laurel. Specifically, on the witness stand Brunson acknowledged being involved in a three-way relationship with Laurel and Brunson, which he admittedly had lied about during his interview with Detective Devries. RT 327-328. In addition, defense counsel questioned Brunson about his statement to Detective Devries that the struggle took place in the dark, and pointed out that Brunson was now claiming that there were some lights which were switched on. RT 280, 360-361. Given Brunson's admissions that his trial testimony on these points were inconsistent with his earlier statements to Detective Devries, it would have been cumulative to play the videotape to establish the inconsistencies in Brunson's statements. See Gonzalez v. Wong, 667 F.3d 965, 1020 (9th Cir. 2011) (holding that witness was "'extensively impeached' based on his own admissions and willingness and motivation to lie" and that "secondary evidence of his propensity to lie" was cumulative).

In sum, the record supports the conclusion that Petitioner was permitted to effectively cross-examine Brunson in an effort to undermine his credibility. As such, the Court finds that there was no violation of Petitioner's constitutional rights as a result of his inability to use the videotape during his cross-examination of Brunson.

B. CLAIM TWO: ADMISSION OF PETITIONER'S INTERVIEW

In his second claim for relief, Petitioner contends that the trial court erred in refusing to admit a videotape of his interview with Simerson, the prosecution's investigator. According to Petitioner, the taped interview would have shown, through his statements and body language, that he had no intention of harming anyone, that he was remorseful and that he accidently attacked Laurel and Brunson with a hammer. Petitioner contends that the trial court's refusal to allow him to play the tape to the jury violated his constitutional right to present a defense and right to due process. Petition at 13-14.

Criminal defendants have a constitutional right under the Sixth Amendment to present a defense; this right is a "fundamental element of due process of law." See Washington v. Texas, 388 U.S. 14, 19 (1967). This right is not absolute, however. See Alcala v. Woodford, 334 F.3d 862, 877 (9th Cir. 2003). The exclusion of evidence does not abridge a defendant's right to present a defense unless it is "arbitrary and disproportionate" and "infringe[s] upon a weighty interest of the accused." United States v. Scheffer, 523 U.S. 303, 308 (1998). Generally, it takes "unusually compelling circumstances . . . to outweigh the strong state interest in administration of its trials." Perry v. Rushen, 713 F.2d 1447, 1450 (9th Cir. 1983). The Supreme Court has repeatedly held that the Constitution permits judges "to exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" Crane v. Kentucky, 476 U.S. 683, 689-90 (1986).

In the instant case, the Court finds that Petitioner's constitutional rights were not abridged by the trial court's appropriate refusal to allow Petitioner to play the videotape of his interview for the jury. At trial, Petitioner was able to elicit from Simerson that during the interview, Petitioner expressed remorse and he had not intended to hurt Laurel or

Brunson. RT 417-419. Petitioner nonetheless argues that he should have been allowed to play the videotape of the interview on the ground that it would have conveyed his demeanor and body language during the interview. However, Petitioner testified at trial and thus was able to express his remorse and intent directly to the jury. Moreover, the record shows that defense counsel reviewed virtually the entirety of Petitioner's interview with Simerson during his cross-examination. As such, there was no need to play the videotape, which would have been cumulative. See Gonzalez, 667 F.3d at 1020.

C. CLAIM THREE: PRIOR DOMESTIC VIOLENCE

Petitioner's third claim for relief alleges that the trial court denied his right to due process by virtue of the admission of evidence of prior domestic violence and corresponding use of CALJIC No. 2.50.02, which instructs that such evidence may be used to show a disposition to engage in domestic violence.

The prosecution sought to present evidence through Laurel that there had been a prior domestic violence incident in 1997 which involved Petitioner throwing "jars and things" at her. RT 21. Over defense counsel's objection, the trial court allowed the evidence in accordance with Evidence Code § 1109. RT 25. In allowing the evidence, the trial court found that the prior incident—which occurred about four years prior to the underlying offense—was relevant to Petitioner's propensity for domestic violence and was not unduly prejudicial. RT 94-95.

At trial, Laurel did not testify, and therefore, the prosecution did not elicit testimony regarding the 1997 incident. During his direct examination, however, Petitioner acknowledged three prior incidents where he hit her. RT 522. One incident occurred fifteen years prior to trial when they had a "knockdown, drag-out fight." Id. A second incident occurred about seven years prior to trial when both Petitioner and Laurel were drunk and hit each other. RT 523. A third incident involved him throwing a jar of mayonnaise against the wall causing it to splatter. Id. After the close of evidence, the court instructed the jury pursuant to CALJIC 2.50.02 that evidence of prior domestic violence, if shown by a preponderance of evidence, may be used to infer that Petitioner had a

disposition to commit other offenses involving domestic violence, and therefore, he was likely to have committed the offense charged in Count 4 (corporal injury to a spouse). RT 597-98.

Petitioner alleges that "CALJIC 2.50.02 and California Evidence Code section 1109 violate federal due process guarantees of a fair trial, because, together, they permit a jury to ignore the presumption of innocence and to find guilt based on evidence that does not amount to proof beyond a reasonable doubt." Petition at 16. The California Court of Appeal flatly rejected Petitioner's claim, finding that prior appellate decisions have held that the application of CALJIC 2.50.02 and California Evidence Code section 1109 does not violate a petitioner's federal right to due process. Respt. Ex. H at 14. Though not cited in the Court of Appeal's decision, the Court also notes that the California Supreme Court has rejected the very argument now advanced by Petitioner. People v. Reliford, 29 Cal.4th 1007, 1016 (2003). Accordingly, the Court finds that Petitioner is not entitled to habeas relief on his third claim. See Schultz v. Tilton, 659 F.3d 941, 945 (9th Cir. 2011).

D. CLAIM FOUR: CALJIC NO. 17.41.1

Claim Four of the Petition challenges the trial court's use of CALJIC No. 17.41.1. Petition at 32. Petitioner raised this claim in the Court of Appeal, Respt. Ex. E, but did not present it to the California Supreme Court on direct review, id. Ex. K, or on habeas corpus, id. Ex. Q. As such, Petitioner failed to fully exhaust this claim. See 28 U.S.C. § 2254(b)(1). But even if he did, the claim fails on the merits. See Brewer v. Hall, 378 F.3d 952, 955-57 (9th Cir. 2004) (rejecting use of CALJIC No. 17.41.1 as a basis for habeas relief).

E. CERTIFICATE OF APPEALABILITY

The federal rules governing habeas cases brought by state prisoners have recently been amended to require a district court that denies a habeas petition to grant or deny a certificate of appealability (COA) in its ruling. See Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (effective December 1, 2009). The Court declines to issue a COA in this case, as Petitioner has not demonstrated that "jurists of reason would find it

debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

IV. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED THAT the petition for a writ of habeas corpus is DENIED. The Court declines to issue a COA. The Clerk of the Court shall enter judgment and close the file.

IT IS SO ORDERED.

Dated: March 30, 2012

Saundra B. Armstrong

SAUNDRA BROWN ARMSTRONG
United States District Judge